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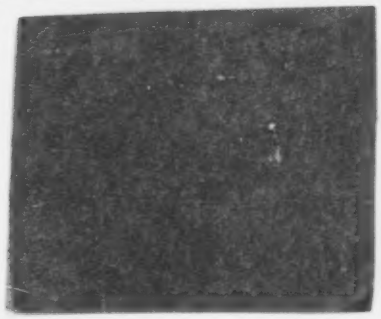

REVIEW OF FURTHER DEVELOPMENTS IN FIELDS WITH WHICH THE SUB-COMMISSION HAS BEEN OR MAY BE CONCERNED

Recognition of gross and massive violations of human rights perpetrated on the orders of Governments or sanctioned by them as an international crime

Expanded working paper submitted by Mr. Stanislav Chernichenko in accordance with decision 1996/116 of 29 August 1996 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities

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Introduction

1. A working paper (E/CN.4/Sub.2/1992/51) dated 13 August 1992 was submitted by Mr. Stanislav Chernichenko to the Sub-Commission on Prevention of Discrimination and Protection of Minorities at its forty-fourth session under agenda item 6 entitled "Question of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of apartheid, in all countries, with particular reference to colonial and other dependent countries and territories: report of the Sub-Commission under Commission on Human Rights resolution 8 (XXIII)". In the paper, it was proposed that, in order to improve the international legal basis for international cooperation in the field of human rights and, in particular, to enhance the effectiveness of efforts to combat human rights violations, the Sub-Commission should consider preparing a draft declaration to the effect that gross and large-scale human rights violations committed on the orders of or with the sanction of a Government constitute international crimes.

2. Since the Sub-Commission did not have sufficient time to consider working paper E/CN.4/Sub.2/1992/51, on 27 August 1992 at its 35th meeting, it adopted without a vote decision 1992/109, in which it authorized Mr. Chernichenko to submit a more detailed working paper on this subject, containing, inter alia, provisions that could be included in an appropriate declaration, and decided to consider the question at its forty-fifth session under agenda item 4, entitled "Review of further developments in fields with which the Sub-Commission has been concerned".

3. Mr. Chernichenko submitted a working paper entitled "Definition of gross and large-scale violations of human rights as an international crime" (E/CN.4/Sub.2/1993/10 and Corr.1), to the Sub-Commission at its forty-fifth session in accordance with its decision 1992/109. Following a short discussion, the Sub-Commission, in resolution 1993/30, expressed its appreciation to Mr. Chernichenko for that working paper and decided to recommend to the Commission on Human Rights his appointment as Special Rapporteur to prepare a report entitled "Recognition of gross and large-scale violations of human rights perpetrated on the orders of Governments or sanctioned by them as an international crime".

4. The Commission on Human Rights, at its fiftieth session, adopted decision 1994/103, in which it decided to request the Sub-Commission to reconsider its decisions containing recommendations concerning new studies and related efforts, including the above-mentioned report. The Commission also decided that it was unnecessary or premature to make any determination on these studies and related efforts and requested the Sub-Commission to present its recommendations to the Commission at its fifty-first session.

5. At its forty-sixth session, the Sub-Commission, in resolution 1994/28, taking into account Commission on Human Rights decision 1994/103, but considering that the preparation of the report was very important and opportune, decided to recommend to the Commission the appointment of Mr. Chernichenko as special rapporteur.

6. The Commission at its fifty-first session, in decision 1995/111, requested the Sub-Commission, bearing in mind the work of the other United Nations bodies on the issue, to reconsider its recommendation to appoint a Special Rapporteur to prepare a report on the recognition of gross and large-scale violations of human rights, perpetrated on the orders of Governments or sanctioned by them, as an international crime.

7. The Sub-Commission, at its forty-seventh session, in resolution 1995/22, taking into account Commission decision 1995/111, reaffirmed its recommendation that the Commission appoint Mr. Chernichenko as special rapporteur.

8. At its fifty-first session, in decision 1996/105, the Commission, taking note of Sub-Commission resolution 1995/22 and bearing in mind the work of other United Nations bodies on this issue, notably that of the International Law Commission, and mindful of the need to avoid unnecessary duplication, decided to postpone the decision on forwarding to the Economic and Social Council the draft decision of the Sub-Commission authorizing the preparation of a report on the recognition of gross and large-scale violations of human rights as an international crime, in order to be able to take into account the work of other United Nations bodies in that field, including that of the International Law Commission.

9. On 29 August 1996, the Sub-Commission, in decision 1996/116, believing that an expanded working paper on the subject would contribute to a better understanding of the subject and would not interfere with the work of other United Nations bodies, decided to request Mr. Chernichenko to prepare, without financial implications, an expanded working paper to be entitled "Recognition of gross and massive violations of human rights perpetrated on the orders of the Governments or sanctioned by them as an international crime", and to submit the expanded working paper in time to be considered by the Sub-Commission at its forty-ninth session.

10. Efforts to curb the most dangerous violations of human rights require a further refinement of international law in this field. There is no doubt that the most dangerous violations are gross and massive violations of human rights. Furthermore, a particular threat among the latter are those perpetrated on the orders of Governments or in some way sanctioned by Governments. The human rights violations in this category are regarded as acts by the State on behalf of which these Governments perform their functions. The violation by the State of the obligation to respect and observe such rights constitutes a violation of the principle of respect for human rights, which is one of the basic principles of contemporary international law. It is the State that is responsible for ensuring respect for human rights, since real power lies in its hands. If it acts otherwise it infringes the international legal order. There is increasing recognition of the fact that mankind constitutes a single unit which cannot remain indifferent to a threat from any of its constituent parts. In the final analysis, gross and massive violations of human rights in any part of the world are a threat to mankind in general. Their elimination or prevention depends on the efforts of the international community. Mankind is unable to protect itself on its own.

It acts through the community of States. A threat to it is obviously much greater if posed by one of the component parts of the international community, namely, a State.

11. A number of serious violations of international law and breaches of the international legal order have been recognized as international crimes. They include certain human rights violations by States. Yet the question remains whether all gross and massive violations of human rights committed on the orders of Governments or sanctioned by them can be regarded as international crimes. A trend to recognize them as international crimes is emerging. However, one further step has to be taken. Such recognition would not merely create a general legal basis for the solution of a number of questions connected with the responsibility of States committing such violations but could also play a significant role as a preventive measure. It would also offer the possibility in future of defining it in more specific terms, gradually creating a conventional basis for regulating these questions in greater detail.

12. A number of comments and recommendations which, in the view of the author of this paper, merit special attention were made during the discussion of working paper E/CN.4/Sub.2/1993/10 by the Sub-Commission. It was pointed out that an effort should be made to establish a link between the responsibility of Governments and the personal responsibility of those who violate human rights. It was also noted that the terms used should be clarified. At the same time it was emphasized that serious human rights violations are often perpetrated by non-government entities, terrorist groups, etc. In this connection reference was made to the importance of devising appropriate international machinery and the view was expressed that the results of the work of the International Law Commission should be taken into account. Attention was furthermore drawn to the fact that international crimes could be perpetrated by States not only on the orders of their Governments but also pursuant to the decisions of other branches of the State, namely, the legislature and the judiciary.

13. In the present working paper, the question of international crimes as a special category of violations of international law is addressed first. It is precisely in this area that the terms used must be clarified, since sometimes one and the same expression, such as "international crimes", is used to characterize the acts of States, individuals and non-government entities. Then the question of the recognition of certain types of human rights violations as international crimes is discussed. Some have already been recognized as international crimes. Others have not yet been so designated, although the logic of international life and their particularly dangerous nature require that they should. For this reason, human rights violations must be classified. In the present working paper the question of responsibility for human rights violations recognized as international crimes is also addressed. However, a detailed analysis of this question is not required of the author of this paper since the problem of the responsibility of States is being studied by the International Law Commission. However, it is touched upon in this working paper to the extent that it is connected with the special nature of gross and massive violations of human rights, and specifically with its relationship with the question of individual responsibility for such violations. The recognition of a certain category of

human rights violations as an international crime is a prerequisite for the development of appropriate international machinery, but a detailed exploration of the matter could be the subject of a separate study. Only its salient aspects are discussed in the present working paper.

14. The present working paper reflects the work of the International Law Commission on the draft code of crimes against the peace and security of mankind and the "Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms" prepared by Mr. Theo van Boven, which was considered by the Sub-Commission, together with the studies on impunity by Mr. L. Joinet and Mr. E.H. Guissé. The working paper is based on the ideas presented in working paper E/CN.4/Sub.2/1993/10. It is the author's intention to formulate a number of general concepts conducive to the further development of international law of human rights. He will therefore endeavour to refrain as much as possible from referring to examples that might lead to the politicization of the present working paper.

I. INTERNATIONAL CRIMES AS A SPECIAL CATEGORY OF VIOLATIONS OF INTERNATIONAL LAW

A. Definition of international crimes and types thereof

15. The division of violations of international law into international crimes and other breaches of international law arose after the Second World War. International crimes are the most serious violations of international law, causing loss or constituting a threat to the entire international community. They are sometimes defined as violations of international law, threatening the existence of States or nations. This is one of the possible variants of the threat to the international community as a whole, since a threat to the existence of any member of the international community in the contemporary world is regarded as a threat to the entire community. International crimes constitute breaches of an obligation erga omnes, that is, they provide grounds for calling the offending State to account not only to any State which has suffered directly but to any other State. At the same time, not every breach of an obligation erga omnes can be regarded as an international crime. The decisive factor that allows the violation of an international obligation to be regarded as an international crime is the object of the infringement, namely, the fundamental interests of the international community. Since an international crime is a violation of international law, clearly it can be committed only by an entity subject to that law. While an international crime can in theory be committed by any subject of international law, it can in practice be committed only by a State.

16. There is no officially recognized definition of an international crime, nor any officially accepted list of State acts which can be regarded as international crimes. Yet the consensus in the doctrine is that there is no point in attempting to draw up an exhaustive list. Even if it were possible to do so, it would be inappropriate at the present time, since international law is evolving and the need to add to the list could not be ruled out. The by now well-known article 19 of the draft articles on State responsibility,

which were provisionally adopted on first reading by the International Law Commission on the basis of the report by Professor R. Ago, give the following definition of an international crime and the more typical forms thereof:

> "2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime.
>
> "3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, inter alia, from:
>
> "(a) A serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;
>
> "(b) A serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;
>
> "(c) A serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;
>
> "(d) A serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas." 1/

17. The provisions of article 19 of the draft articles on State responsibility have had a considerable impact on doctrine. They are worded in such a way as to give a sufficiently complete idea or what is meant by an international crime and what violations of international law may be regarded as international crimes. Article 19 first states that an international crime is an act by a State constituting a breach of international law; secondly, that this violation is directed at the fundamental interests of the international community; thirdly, that it is regarded as particularly serious, as a crime, by the international community as a whole. To some extent the term "international crime" is in the nature of a metaphor, since it implies the violation of international and not criminal law. The word "crime" in this context emphasizes the seriousness of the violation. Article 19 contains a list not of types but of categories of breaches of international obligations that can be assimilated to international crimes. Types of international crimes are given as examples (aggression, genocide, etc.). This suggests that it is undesirable and even impossible to compile a complete and accurate list of international crimes.

18. Several points connected with the concept of international crimes have given rise to disputes which are still continuing. These points were considered in detail by the International Law Commission, and it would

obviously be inappropriate to dwell on them at length, since to do so would be encroaching on the Commission's domain. It would also be undesirable to embark upon a more detailed discussion of them since that might divert attention from the central problem. Regardless how article 19 of the draft articles on State responsibility is assessed, attention should be focused on matters that give rise to no or very few objections or doubts. For example, it is considered virtually to be beyond all question that violations of international law are subdivided into international crimes and ordinary violations of international law. It is also difficult to take issue with the idea that international crimes are breaches of international obligations erga omnes. Nor is there any doubt that international crimes are not any breaches of obligations erga omnes but only of the most serious ones directed at the international community as a whole. No one questions the fact that international crimes have been or can be perpetrated by States. And it is quite clear that there is no generally accepted list of international crimes in existence. It may also be noted that there is general agreement on what types of violations of international law can be regarded as international crimes only in respect of certain types of such crimes (aggression and genocide, for example). Article 19, by listing various categories of violations of international law which may be regarded as international crimes, offers general guidance. Practical experience, however, indicates that certain types of international crimes referred to in article 19 have to be specified in greater detail (massive pollution of the atmosphere or of the seas, for example) or described more accurately in the context of present conditions (apartheid). At the present time, for example, so-called "ethnic cleansing" policies could be included among international crimes.

B. Crimes against international law

19. Apart from the term "international crime", the expressions "crimes against international law", "crimes under international law" and "crimes of an international nature" have gained wide currency. The expression "crimes against international law" was used in the judgement of the Nürnberg Tribunal, which stated that "Crimes against international law are committed by men, not by abstract entities ...". The expression "crime under international law" appears in article 1 of the English text of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948. It is also to be found in the wording of a number of principles of international law, recognized by the Charter of the Nürnberg Tribunal and reflected in its judgement, which were formulated at the second session of the International Law Commission in 1950 and submitted to the General Assembly. The term "crimes of an international nature" is also used, sometimes in respect of practices such as piracy and the slave trade. Quite often the expressions "crimes against international law", "crimes under international law" and "crimes of an international nature" are regarded as synonymous.

20. A number of international agreements, many resolutions of international organizations and other instruments refer to war crimes, crimes against mankind or humanity and crimes against peace. This terminology was initially developed in connection with the bringing to justice of the main war criminals of the European Axis Powers in 1945. The following acts, recognized as crimes and coming within the jurisdiction of the Nürnberg International Military Tribunal, were listed in article 6 of its Charter:

"(a) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

"(b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

"(c) Crimes against humanity: namely, murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

Article I of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 26 November 1968 includes under the heading of such crimes:

"(a) War crimes as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, particularly the 'grave breaches' enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims;

"(b) Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid, and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed."

On 3 December 1973, the General Assembly adopted resolution 3074 (XXVIII) entitled "Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity". The resolution does not disclose the nature of these crimes but simply refers to them. Paragraph 7 of the resolution also refers to a crime against peace, in addition to a war crime and a crime against humanity. The most general name for such crimes would obviously be "crimes against the peace and security of mankind". The draft code of crimes against the peace and security of mankind is being considered by the International Law Commission which, in its deliberations, took into account the various international

agreements, resolutions and even drafts on this question (the Nürnberg Principles, the Convention on the Prevention and Punishment of the Crime of Genocide, the definition of aggression, etc.).

21. Objections can be raised to any of the wording used in agreements and resolutions on crimes against international law, just as it might be possible not to agree with the inclusion of certain crimes in the draft code. However, there is no doubt whatever about the existence of crimes against international law. There is also general agreement on more or less which types of acts are covered by this concept. It should be noted that wherever reference is made to crimes against international law (crimes under international law) what is meant is the acts of individuals, acting in their official capacity or as private persons. Article 6 of the Charter of the Nürnberg International Military Tribunal states:

> "The Tribunal established ... for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes."

One example is offered by the principles of international law, recognized by the Charter of the International Tribunal and reflected in its judgement, which were endorsed by the International Law Commission. Principle I is worded as follows: "Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment." Article IV of the Convention on the Prevention and Punishment of the Crime of Genocide states that "Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."

22. It would be logical to draw a number of conclusions based on the analysis of these instruments. In the first place, by comparing the terms "crimes against international law", "crimes under international law", "crimes against peace", "war crimes", "crimes against humanity" and "crimes against the peace and security of mankind", it may be said that their legal effect in the context of these instruments is the same, namely, in all cases they relate to the acts of individuals. Secondly, this is what mainly distinguishes them from the acts covered by article 19 of the draft articles on State responsibility. The acts listed in article 19 are the acts of States. This distinction will be discussed in greater detail below. Thirdly, only those acts of individuals which are recognized as crimes by the international community as a whole or in part are regarded as crimes against international law. This recognition also implies recognition of the fact that States must combine their efforts in order to curb them. The concept of crimes against international law is broader than that of crimes against the peace and security of mankind. They coincide only to some extent. Individuals can commit acts recognized at the international level to be so dangerous as to be classified as crimes requiring the combined efforts to States to deal with them, such as crimes against international law which, nevertheless, are not so dangerous as to be placed under the heading of crimes against the peace and

security of mankind. The International Law Commission, in adopting the draft code of crimes against the peace and security of mankind in 1996, noted that the inclusion of certain crimes in the code did not affect the status of other crimes under international law. 2/

23. The term "international crimes" is sometimes used in the literature on the subject to designate both the acts of States and those of individuals. In other words, in the latter case it covers, in the view of certain authors, crimes against international law (crimes under international law, etc.). The term in this broad sense is usually used by experts in the field of international criminal law. They include it in the list of international crimes together with aggression and apartheid, piracy, acts directed against the safety of aerial communications, etc. 3/ It may be noted that some of these acts can only be committed by States or primarily by States, whereas others are committed mainly by private individuals. Aggression proper (not its preparation, nor the order to launch it, etc.) is without question the act of a State. Piracy, with the exception of so-called State piracy, is invariably the act of private individuals.

24. The acts of States and the acts of individuals constituting a threat to the international community or causing it prejudice can be placed under the same heading if the monist theory of the relationship between international and domestic law is accepted. According to this theory, international and domestic law constitute a single legal system and international law can directly regulate the conduct of individuals who, by their acts, can violate its norms. It would appear that this is also confirmed by certain parts of the judgement of the Nürnberg Tribunal, namely, "That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized ... individuals may also be punished for the violation of international law." However, these words should be viewed in the context of other provisions of the judgement where they might be interpreted in a different fashion. In this instance the Tribunal was pursuing a single goal, namely, to demonstrate that the attempts of the accused to evade responsibility by stating that they had acted as representatives of the State and that their acts should therefore be regarded as acts of the State not rendering them personally responsible, were unconvincing. Moreover, the confusion between the terms "international crime" and "crime against international law" is explained to some extent by the fact that the judgement of the Nürnberg Tribunal failed to clarify this point fully, since the notion of international crimes at that time was only just being established and the judgement failed to make a clear-cut distinction between the two concepts. The wording of the judgement was of course influenced by the fact that the Tribunal consisted of representatives of various legal systems and schools of thought.

25. Supporters of the dualist theory of the relationship between international and domestic law, according to which they constitute two distinct legal systems (although influencing one another and interacting), take a different view of the possibility of the direct application of international law to individuals. So-called moderate dualists allow that individuals may, in certain circumstances, be liable to the direct application of norms of international law, become its subjects and directly violate international law by their acts. The more radical dualists reject this

possibility, considering that, since international law only regulates relations between States and that individuals are by their nature incapable of participating in such relations, international law cannot directly regulate the conduct of individuals. In their view, individuals cannot directly violate the norms of international law since such norms are established not for them but for States and certain other entities capable of participating in relations between States, such as peoples and nations whose statehood is being established, independent cities and intergovernmental organizations. Without dwelling on the theory of the transformation of international law into domestic law, upheld by the advocates of the dualist theory, it may be noted that, according to the views of the more radical of the dualists, crimes against international law are the acts of individuals which States, in respect of one another, undertook to regard as crimes, punish those found guilty of their perpetration and cooperate with one another to curb (by exchanges of information, the extradition of criminals and even the establishment of international criminal courts).

26. It must be borne in mind that the expressions "crimes under international law" (see the English text of the Convention on the Prevention and Punishment of the Crime of Genocide) and "crimes against humanity" (International Convention on Suppression and Punishment of the Crime of Apartheid), as well as the term "international crime", are sometimes used to designate not only the acts of States but also those of individuals. For example, apartheid is declared to be a crime against humanity and yet it is stated that it includes "similar policies and practices of racial segregation and discrimination". But the policy it implies is not applied by individuals on their own but by States. Consequently, what is meant in this specific case is the acts of the State together with the acts of individuals and organizations. Regardless of this lack of terminological clarity and differences in concepts, both monists and dualists as a whole obviously agree that the term "international crime" can be used to designate the most serious violations of international law committed by States.

C. Relationship between international crimes and crimes against international law

27. Whatever theory of the relationship between international and domestic law one favours, it would be logical to introduce some terminological exactitude into the question of what constitutes international crimes and crimes against international law. The use of a single term to designate two different things may lead to theoretical confusion and have undesirable practical consequences, and one can hardly object to using different terms for this purpose. The acts of individuals and the acts of States are not the same thing, although in certain circumstances they may be closely related (when individuals act on behalf of the State). This is confirmed by the writings of the International Law Commission, which broadly reflect either existing practice or developing trends. The Commission has repeatedly emphasized the difference between a crime committed by a State and a crime committed by an individual, even one acting on behalf of the State. In the report on the work of its forty-fifth session, for example, it talks of the consequences of international "crimes" by States, putting the word "crime" in inverted commas. 4/ In so doing, it indicated that an international crime is not a crime in the criminal law sense. The Commission's comments on the statute of

the International Criminal Court point out that the crime of aggression presents more difficulty than that of genocide in that "there is no treaty definition comparable to genocide". 5/ The Commission observed: "General Assembly resolution 3314 (XXIX) of 14 December 1974 deals with aggression by States, not with the crimes of criminals". 6/

28. In the light of these references, which reflect established trends in doctrine and practice, and for complete clarity in the terminology used, it is appropriate to use international crime only for the acts of States directed against the international community which constitute serious breaches of international law. Crimes against international law (crimes under international law) should be regarded as acts by individuals posing a danger on an international scale, recognized by States as criminal, and requiring concerted efforts to combat them. They include crimes against the peace and security of mankind. The list of crimes against international law, like that of international crimes, can be only approximate since it is evolving. In the 1940s, for example, crimes against the safety of civil aviation did not exist. Some idea of what acts may be classified as crimes against international law can be gained from the draft code of crimes against the peace and security of mankind. A more general indication is given in article 20 of the draft statute of the International Criminal Court, adopted by the International Law Commission. This reads:

> "The Court has jurisdiction in accordance with this Statute in respect of the following crimes:
>
> (a) The crime of genocide;
>
> (b) The crime of aggression;
>
> (c) Serious violations of the laws and customs applicable in armed conflict;
>
> (d) Crimes against humanity;
>
> (e) Crimes, established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern." 7/

The article refers to genocide and aggression as crimes committed by individuals, not acts by States. Similar is the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, set up under Security Council resolutions 808 (1993) of 22 February 1993 and 827 (1993) of 25 May 1993. The list of offences over which the International Tribunal has jurisdiction includes grave breaches of the Geneva Conventions of 1949 (art. 2), violations of the laws or customs of war (art. 3), genocide (art. 4), and crimes against humanity (art. 5). Also similar is the list of crimes in the statute of the International Tribunal for Rwanda, established by Security Council resolution 955 (1994) of

8 November 1994. This includes genocide (art. 2), crimes against humanity (art. 3), and violations of article 3 common to the Geneva Conventions and of additional Protocol II (art. 4).

29. Crimes against international law are not necessarily associated with international crimes. In many instances they can be committed by private individuals (piracy, slave trading, highjacking aircraft, counterfeiting currency and so forth). Even if they appear among the crimes covered by the draft code of crimes against the peace and security of mankind, the draft statute of the International Criminal Court or the statutes of the international tribunals, they are not always associated with international crimes. Genocide can be committed by a private individual on his own initiative, as by a big landowner acting against indigenous peoples on his land. There are, of course, instances when crimes against international law are always or nearly always associated with an international crime. The most telling example is aggression. People planning and organizing aggression are committing a crime against international law and the State they lead is committing an international crime.

30. Without a doubt, the most dangerous crimes against international law are those connected with or in practical terms coterminous with international crimes. A distinction must be drawn between the acts of individuals as private persons and those of individuals acting on behalf of the State. A State is not an abstract concept but primarily an organization of people. Its acts, therefore, will always be the acts of particular individuals. In this sense it can be said that international legal norms addressed to the State are ultimately addressed to the individuals acting on its behalf. Whether or not we acknowledge the possibility of regulating the behaviour of individuals directly by means of international law, it is clear that States' obligations under international law can be honoured only if the people on whom such compliance depends act in accordance with them. The same acts may be regarded from several different viewpoints. If any senior official (for example a head of State, head of Government or minister for foreign affairs), acting in his official capacity, violates international law, his acts must in the first instance be regarded as acts of the State itself, providing grounds for holding the State responsible under international law. The same acts, regarded as those of an individual, may in certain circumstances (if the State has committed a serious breach of international law, qualifying as an international crime) entail criminal responsibility for the individual. These are acts by individuals making use of the State to commit an international crime. It is precisely these persons' official positions that enable them to act in this way and their actions to be regarded as acts of the State.

31. It is far from always true that the acts of officials, if regarded as acts of the State, that violate international law, are international crimes. It all depends on how serious they are. The scale of such acts and the position of the officials carrying them out are of enormous importance. Hence the persons concerned are not always held criminally liable. On the other hand, it is possible for officials or other individuals acting on behalf of the State - soldiers for example - to commit crimes against international law, i.e. to be liable in principle to criminal proceedings, but their acts, regarded as the acts of a State, are not far-reaching or dangerous enough to be regarded as international crimes, and are simply international delicts.

Thus it may be said that international crimes are always associated with crimes against international law, but crimes against international law are not necessarily associated with international crimes.

32. The correspondence between the acts of a State constituting an international crime and the acts of individuals acting on behalf of the State which together amount to that international crime is far from complete. The acts performed personally by an official, however highly placed, who makes use of the State to commit an international crime, cannot embrace all the acts of the State constituting that crime. Aggression by a State, i.e. an international crime, includes acts by the head of State, the chief of staff and so forth, each one of which, considered as the act of an individual, could be regarded as a crime against international law.

II. INTERNATIONAL CRIMES AND VIOLATIONS OF HUMAN RIGHTS

A. Classification of human rights violations

1. General comments

33. Inasmuch as human rights are rights and freedoms of substantive importance to a person's legal standing in society - in the absence of which, normal life in modern society is not considered possible - not every breach of a person's rights can be counted as a human rights violation. The unwarranted imposition of some petty tax or charge, for example, cannot be regarded as a violation of human rights.

34. Violations may be of individuals' rights or massive, indicating that the human rights situation in a particular State is unwholesome. Both kinds, moreover, can be minor or major, i.e. gross. Lastly, they may be isolated occurrences or systematic. Individual violations must therefore be distinguished from situations in which violations are typical. Besides, individual and mass violations may be committed with a greater or lesser degree of State involvement or independently of the will of the State, by private individuals and groups.

35. Human rights violations may be subject to consideration at the international level or not. United Nations practice indicates that gross and massive violations of human rights, irrespective of whether they are isolated occurrences or systematic, are regarded as breaches of the principle of respect for human rights - in other words as unquestionably an international problem, requiring consideration at the international level. There is no such unanimity regarding the possibility of considering individual cases in international bodies. Traditionally, it has been possible for individual cases to be considered at the international level if the State concerned has given its assent. Such assent is usually provided for in an international treaty (for example, in the first Optional Protocol to the International Covenant on Civil and Political Rights of 1966, or the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950). In the absence of a treaty commitment, the States concerned are generally very reluctant to agree to the consideration of individual cases, although in principle such consideration, given ad hoc assent, has been regarded as legitimate (for example, in the Commission on Human Rights or even in

bilateral relations). Without the assent of the State concerned, it has of course been possible to discuss individual cases in international bodies if they illustrate established gross and massive violations of human rights (for example, the policy of apartheid). Violations of the rights of a citizen of one State within the jurisdiction of another can also be discussed at the international level, in particular bilaterally. In such cases, the victim's State is entitled to defend him through its diplomatic or consular missions. Other individual instances of human rights violations have been regarded as belonging in essence to States' domestic jurisdiction and not subject to discussion at the international level, on the assumption that States can restore domestic order without the help of the international community.

36. Individual instances, even if considered at the international level, have normally been regarded as breaches not of the principle of respect for human rights but only of some rather more specific international obligation. Now, however, multilateral international bodies are beginning to find themselves confronted with individual instances of human rights violations irrespective of the victim's nationality and without the assent of the State concerned. Sometimes, given their flagrant nature, such violations are regarded as breaches of the principle of respect for human rights. This is becoming a more and more pronounced trend in relations between States: in other words, the sphere of application of the principle is expanding. As yet, however, no clear legal guidelines have been established for determining which individual instances may be considered at the international level without the assent of the State concerned (in the light of the above).

2. Criteria for the classification of human rights violations

37. Finding the dividing line between the various categories of violations is fairly difficult because, all in all, the attempt to formulate criteria by which to assign such violations to one or another category has not been successful. Not a single resolution by an international organization, not a single decision by an international conference, offers a criterion for the delineation of human rights violations. They only indicate the nature of such violations. Paragraphs 7 and 11 of the Proclamation of Teheran (the International Conference on Human Rights) of 13 May 1968 refer to "gross denials of human rights", while paragraph 10 mentions "massive denials of human rights". It should, by the way, be noted that the terms used in the various official language versions do not coincide. Economic and Social Council resolution 1503 (XLVIII) of 27 May 1970 twice (in paras. 1 and 5) mentions "a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms". General Assembly resolution 32/130 of 16 December 1977 uses, in paragraph 1 (e), the expression "mass and flagrant" violations of human rights. The Vienna Declaration and Programme of Action of 25 June 1993, adopted at the World Conference on Human Rights, uses the expressions "massive violations of human rights" (para. I.28), "continuing human rights violations" (para. I.29), and "gross and systematic violations" (para. I.30).

38. One of the hardest problems is to draw the line between individual instances and massive violations of human rights. While there is no difficulty in defining an individual incident, it is impossible to establish

what the criteria should be for massive violations of human rights. Although massive violations are composed of individual ones, the number of individual violations that constitute a massive violation of human rights is indefinable.

39. It is also difficult to draw the line between minor and gross violations of human rights. This can be done only approximately. The conclusions of the Maastricht Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms (11-15 March 1992), contain the statement that:

> "... the notion of gross violations of human rights and fundamental freedoms includes at least the following practices: genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, disappearances, arbitrary and prolonged detention and systematic discrimination." 8/

They continue:

> "Violations of other human rights, including violations of economic, social and cultural rights may also be gross and systematic in scope and nature and must consequently be given all due attention in connection with the right to reparation." 9/

It is easily seen that the specimen list of gross violations of human rights here basically includes massive violations: genocide, disappearances, etc. Torture and arbitrary and prolonged detention may apply to an individual and be in the nature of individual incidents, but genocide, slavery-like practices, and mass and arbitrary executions are massive violations of human rights. In fact, experience shows that massive violations are always gross in nature, and gross violations of individuals' rights, torture, arbitrary and protracted detention lead, if they go unpunished, to massive violations or indicate that such violations have already begun. The same can also be said of systematic violations of human rights. In theory it is possible to conceive of systematic violations of the human rights of a particular person or small group of persons. A failure to nip them in the bud, however, would probably indicate a generally unhealthy human rights situation. As regards massive systematic violations of human rights, they tend as a rule to be gross.

40. Attempts have been made to "measure" violations of human rights. One idea that merits attention is to use three indicators: the scope of violations, i.e. the degree of seriousness; their intensity, i.e. the frequency of their occurrence over a given period of time; and their range, i.e. the size of the population affected. 10/ One may object to the terms proposed. The intensity of human rights violations denotes less the frequency of occurrence than the degree of severity, or both. But in principle, "measuring" human rights violations like this is clearly the right way to go. With such an approach, a number of factors should be measured: three is clearly insufficient. It is particularly difficult to use the indicators in analysing violations of economic, social and cultural rights. Not coincidentally, when examples of gross and massive violations of human rights

are cited, it is normally civil and political rights that are referred to. This might be explained by the fact that violations of economic, social and cultural rights often stem from Governments' lack of real means of improving a situation.

41. Human rights violations may be discussed in international bodies irrespective of any State involvement in their perpetration. An isolated violation committed by a private individual or group of persons obviously bears no relation to cooperation among States. As a general rule, a State does not bear responsibility for the actions of private individuals. The only exceptions are when a State tries to prevent the culprits from being brought to account. Whether a violation of human rights can be regarded as the act of a State is a question of cardinal importance. If it is committed by any State body or official, acting within its/his authority or ultra vires, it is considered to be an act by the State (regardless whether it is suitable for discussion at the international level). The more exalted the body or official in the State apparatus, the more harm it or he can do to human rights. Gross and massive violations of human rights can be committed by local State bodies and officials, too, but the danger of such violations increases immeasurably when they are committed by, for example, a parliament passing racist laws, or a ministerial cabinet conducting a repressive policy.

42. On the subject of human rights violations committed on the orders or with the sanction of Governments, it must be borne in mind that the term "Government" in this context is used not in the narrow sense, to designate the highest executive organ (the council of ministers, cabinet or suchlike), but the entire system of State bodies, particularly legislative and executive, and the associated officials, since it is they who are most often the instigators when violations of human rights occur. The Encyclopaedia Britannica also uses the term "Government" in the broadest sense, to designate the ruling power in a political society. The term "orders" must also be interpreted in a broad sense, to mean laws, regulatory and individual acts passed by executive authorities and judicial decisions inclining towards violations of human rights.

43. Violations of human rights are not always committed on direct orders officially handed down. The Government can also inspire violations of human rights which are formally committed by private individuals ("death squads", for example), or incite people to, or connive at, such violations. In such circumstances the hardest problem is to unearth evidence of such conduct on the Government's part. This, however, must be the subject of a separate study. It is not the procedural but the material side of classifying actions violating human rights that is under consideration here. A Government may tacitly or officially approve violations of human rights committed by private individuals. Thus there are many ways in which Governments can be involved in the perpetration of violations of human rights. For brevity, all indirect involvement by Governments in such violations may be called Government-sanctioned. This, like direct involvement, must in relations between States be considered to be a State violation of human rights.

44. The difficulties in dividing violations of human rights into categories should not be understood to diminish the importance of such a classification. While there are practical difficulties in assigning a violation of human

rights to a particular category, it must be borne in mind that only by classifying them can one single out the most dangerous categories of violations and rate them appropriately under international law, by associating them with the notion of international crimes.

B. Human rights violations recognized as international crimes

45. Article 19, paragraph 3 (c), of the draft articles on State responsibility assigns to a particular category of violations of human rights, whose gross and massive character it emphasizes, the status of international crimes. As examples it gives slavery, genocide and apartheid. Inasmuch as the draft has yet to become an international treaty in force, its provisions may be regarded only as proposals. It is beyond doubt, however, that draft article 19, and paragraph 3 (c) in particular, is based to some extent on practice. It is also clear from the wording of paragraph 3 (c), that not only slavery, genocide and apartheid but also other comparably gross and massive violations of human rights may be regarded as international crimes.

46. International treaties in force that treat certain violations of human rights as international crimes include the Convention on the Prevention and Punishment of the Crime of Genocide, of 9 December 1948, and the International Convention on the Suppression and Punishment of the Crime of Apartheid, of 30 November 1973. Article I of the Convention on the Prevention and Punishment of the Crime of Genocide states:

> "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."

Article I.1 of the International Convention on the Suppression and Punishment of the Crime of Apartheid provides that:

> "The States Parties to the present Convention declare that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security."

One may wonder that the Conventions do not use the term "international crime". The English text of the Convention on the Prevention and Punishment of the Crime of Genocide speaks of genocide as a crime under international law. The International Convention on the Suppression and Punishment of the Crime of Apartheid declares apartheid a crime against humanity. At first sight, it would appear that the contracting parties had decided to regard only acts by individuals (official and private) as criminal (i.e. crimes against international law). Indeed, the main objective of both conventions is to establish legal conditions whereby individuals committing the acts described as genocide and apartheid can be held criminally responsible. But as mentioned above, some terms are already in use to designate the acts of both individuals and States ("international crime", "crime under international law",

"crime against humanity" and so forth). Such broad interpretations of the terms are typical of international documents adopted shortly after the end of the Second World War, including the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. As practice and the analysis of international documents have shown, genocide and apartheid are indisputably considered to be international crimes when regarded as the acts of States, as the aforementioned draft article 19, paragraph 3 (b) also illustrates.

47. The fact that international agreements regard any violation of human rights as an international crime does not necessarily mean that such a view of the violation is generally accepted. All it means is that the violation is qualified as an international crime by the parties to the agreements in question. If those agreements become truly universal, the qualification will of course be generally recognized. But completely universal international agreements (to which all the world's States are party) scarcely exist, especially in the field of human rights. Still, agreement on such a qualification among the majority of the international community compels the minority to reckon with it. It is possible that a treaty might be based on an assessment of a particular human rights violation as an international crime that has already gained widespread recognition. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide should be understood in this sense. It is not impossible that the definition in an international agreement of a certain type of human rights violation as an international crime will over time come to be tacitly supported by the remaining members of the international community who are not parties to the agreement. Incidentally, the abolition of the apartheid regime may have an impact on the International Convention on the Suppression and Punishment of the Crime of Apartheid, since under article II, the Convention applies to the policies and practices of racial segregation and discrimination "as practised in southern Africa". This does not, however, mean that the abolition of the apartheid regime in South Africa automatically entails the disappearance of the understanding that apartheid is an international crime, for there is still a risk that the policies and practices of apartheid will re-emerge under a different name in other parts of the world.

48. Indirect confirmation of the fact that some human rights violations are now universally, or nearly universally, recognized as international crimes can be found in the judgment by the International Court of Justice on the Barcelona Traction Case, in the analysis of the features of obligations erga omnes:

> "... Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination." 11/

As has already been noted, a breach of obligations erga omnes may not always be an international crime, but an international crime always constitutes a breach of obligations erga omnes. Since the Court clearly considered the obligations to outlaw aggression, genocide, slavery and racial discrimination to be of equal importance, its assumption must obviously have been that breaches of such obligations are also equally serious. But since aggression

and genocide are generally recognized as international crimes, it is logical to conclude that slavery and racial discrimination, which the Court ranks alongside aggression and genocide, must also be regarded as international crimes.

C. The problem of recognizing particular categories of gross and massive violations of human rights as international crimes

1. The need for such recognition

49. The wording of article 19, subparagraph 2 (c) of the draft articles on State responsibility and that of the judgment of the International Court of Justice referred to above reveals that the prevailing trend is to regard not only genocide, apartheid, slavery and racial discrimination but also other grave and massive violations of human rights as international crimes. This trend suggests that the international community wishes it to be formally enshrined as a principle of international law. However, the translation of this trend into a principle of international law is hampered to a considerable extent by the lack of precise criteria for deciding which categories of human rights violations should be regarded as international crimes. The problem cannot be solved by adding new types of gross and massive violations of human rights to the list of acts that constitute international crimes, although there can be no doubt that it would be desirable to continue defining various types of violations of human rights in specific terms.

50. Declaring gross and massive violations of human rights perpetrated on the orders of a Government or with its sanction to be international crimes will establish a firm basis in international law for addressing, first, the grave international legal responsibility of the State on behalf of which a Government acts and, second, the question of the criminal responsibility of officials perpetrating such violations. Furthermore, such a basis will provide an opportunity for more productive formulation of new specific material and procedural obligations in the context of action to combat human rights violations. Work on the draft articles on State responsibility and the draft code of crimes against the peace and security of mankind is advancing extremely slowly, and the former obviously deals only with the responsibility of States, while those articles of the latter which were adopted on first reading deal only with the criminal responsibility of individuals.

51. The international community's demand that a particular category of human rights violations should be classified as an international crime would obviously not fully be met even if article 19, subparagraph 2 (c), of the draft articles on State responsibility was already in force in its present form. It is couched in terms too vague even for a general principle. A list of obligations in the field of human rights, violation of which would be regarded as an international crime, would need to be more detailed. To some extent, this could be facilitated by the adoption of the code of crimes against the peace and security of mankind, the draft of which classifies a number of human rights violations other than genocide and apartheid as such crimes. Violations of this kind, when perpetrated by officials, could, in the context of inter-State relations, be regarded as acts of the State, in other words, as international crimes. At the same time, bringing the code into force would not by itself imply recognition as a principle that in general all

gross and massive violations of human rights ordered or sanctioned by a Government are international crimes, since the code deals only with the criminal responsibility of individuals. Furthermore, the emphasis in the draft is on acts that are committed systematically and on a large scale. However the acts referred to, being gross human rights violations, may be perpetrated by officials on a large scale but on a single occasion. This does not detract from the threat they pose to the international community as a whole, and hence their classification as international crimes is warranted.

52. Crimes against the peace and security of mankind and crimes against international law in general can be perpetrated by officials and private individuals. Article III of the Convention on the Prevention and Punishment of the Crime of Genocide states:

> "International criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State, whenever they:
>
> "(a) Commit, participate in, directly incite or conspire in the commission of the acts mentioned in article II of the present Convention;
>
> "(b) Directly abet, encourage or cooperate in the commission of the crime of apartheid."

The criminal responsibility of private individuals for acts of this kind may be no less than that of officials. However only acts committed by public officials, irrespective of rank, can be international crimes as defined in article 19 of the draft articles on State responsibility, since it is precisely the official position of such persons that confers on such acts the character of State acts.

53. Even if the acts of individuals not holding an official position constitute flagrant violations of human rights on a large scale (such as the acts of insurgents and armed bands), the only question that generally arises is that of the criminal responsibility of those directly concerned and not the responsibility of the State under international law. Possible exceptions are violations of this kind perpetrated on territory under the control of a Government which, however, for some reason fails to exercise such control effectively or does not wish to do so. Gross and massive violations of human rights perpetrated by persons without any official standing may be regarded as State acts and international crimes if such persons in fact are in a position to influence State policy and use the State to perpetrate international crimes.

54. Declaring gross and massive violations of human rights ordered or sanctioned by a Government to be international crimes could to some extent help to prevent gross and massive violations of human rights by acting as a warning to Governments and public officials. Such a warning would not

absolutely guarantee that such violations will not occur, but it could not be ignored. An analogy is provided by the 1974 Definition of Aggression which is regarded as a deterrent to any potential aggressor.

2. Criteria for defining violations of human rights as international crimes

55. The question arises whether violations of human rights which can or should be regarded as international crimes should be classified as a single international crime or as a number of international crimes. The fact that genocide, apartheid and several other types of human rights violations are regarded as international crimes in their own right suggests that the latter course would be more appropriate. In reality, however, the one does not preclude the other. Various categories of human rights violations cover various forms of violations. If each of these forms constitutes an international crime then the category itself may also be so characterized. In other words, by classifying a particular category of human rights violations as an international crime, we are emphasizing that any form which such violations may take is also an international crime.

56. The most general characteristics of human rights violations that could be classified as international crimes are as follows:

(a) The gross and massive nature of any such violations (bearing in mind that any systematic violations fall into the category of massive);

(b) The perpetration of such violations on the direct order of a Government, at its instigation, with its connivance, with the Government's approval after the fact, or with its sanction in some other form (Government being understood to mean the authorities of the State which act in its name and are in control of the country). Human rights violations of this kind, when perpetrated by private individuals who hold de facto power in the State, or wield influence over the Government, may be considered to have been sanctioned by the Government in one way or another. The same also applies to the acts of public officials at any level acting ultra vires if no steps are taken by the State to call them to account. If such measures are taken, gross and massive violations of human rights perpetrated by such individuals should not be regarded as international crimes, regardless of the concerns they arouse within the international community. Moreover, when deciding whether a given case of gross and massive violations of human rights should be regarded as an international crime, it should be borne in mind that restrictions on human rights may be lawful, especially in emergency situations, and the degree of control by the Government over the situation prevailing in a country or part of it should also be taken into account. The human rights restrictions introduced by a Government in the event of an armed conflict or in an emergency situation and corresponding to appropriate international standards cannot, of course, be regarded as violations of human rights. Nor is there any question that gross and massive violations of human rights that occur on territory not under the real control of a Government should be regarded as international crimes, in other words they should not be regarded as acts of the State on behalf of which the Government in question is acting.

III. RESPONSIBILITY FOR HUMAN RIGHTS VIOLATIONS RECOGNIZED AS INTERNATIONAL CRIMES

A. Relationship between the responsibility of the State and of individuals for violations of human rights

57. The present paper is not concerned with various general questions relating to legal responsibility since they have been considered for a number of years by the International Law Commission. The discussion will therefore be confined to those aspects of responsibility which are connected with violations of human rights and which must be clarified in connection with the recognition as international crimes of gross and massive violations of human rights perpetrated on the orders of Governments or sanctioned by them. Such recognition however, does not automatically solve all the problems raised by the responsibility of States and individuals for their perpetration. It can only prepare the ground for their solution. For this reason it is important to outline in general the responsibility of States and individuals which could result from such recognition.

58. It must be remembered that not every violation of human rights entails the responsibility of States under international law, since not every such violation constitutes a breach of an international obligation (such as the act of a private person). If a given violation of human rights does not constitute a breach of a State's international obligation, the question might then arise, within that State, of the responsibility of the perpetrators of that act. Such responsibility may be criminal, civil or administrative. If the violation of human rights constitutes a breach of the State's international obligations, it is far from always being so serious as to be regarded as an international crime de lege lata or de lege ferende, or even simply as a breach of an obligation erga omnes. Such violations often constitute breaches of specific treaty obligations. The responsibility of States under international law in these cases is rather vague and even, in some cases, symbolic, and the task of determining the responsibility of individuals participating in the acts constituting a breach of international obligations is usually left up to the violating State.

59. In more serious cases, when gross but not massive violations of human rights are committed, they may sometimes nevertheless constitute breaches of treaty obligations and even be regarded as a breach of an obligation erga omnes. Such cases raise the question of the responsibility not only of the State but also that of the persons who participated in the acts resulting in such breaches. Mr. Theo van Boven, in his preliminary report on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, noted that "There is no doubt that the obligation to provide for compensation as a means to repair a wrongful act or a wrongful situation is a well established principle in international law." 12/ Yet any principle has to be stated in specific terms. If the question of the responsibility of the State and the persons committing gross violations of human rights is covered in sufficient detail by an international agreement its solution becomes that much easier. Unfortunately, international agreements on this subject are not replete with specific provisions. This was precisely why Mr. Theo van Boven, in his final report, presented more specific principles on the right to reparation for victims of

violations of human rights. In 1996 he submitted to the Sub-Commission a set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law. 13/ These principles must of course also be defined in more specific terms, and it is assumed that this will be done in the legislation adopted by States. Yet, in any case, they point to the conclusion that States may and must incur a sufficiently serious degree of responsibility for gross violations of human rights in the manner provided for by international law, despite the fact that such violations, if not on a large scale, do not constitute international crimes. Persons participating in the perpetration of such acts should incur criminal and civil responsibility. The punishment of such persons and their criminal responsibility is of particular importance. Gross violations of human rights are almost always regarded as crimes, that is, as acts entailing the criminal responsibility of persons committing them in accordance with the legislation of States or international law. A State which fails to recognize any obviously gross violations of human rights as crimes runs the risk of being accused of creating conditions conducive to their perpetration. From here it is only one step to their perpetration on a large scale. The problem is the lack of a list of gross violations of human rights. Mr. Theo van Boven presents examples of such violations in his study, but those he refers to are not simply gross violations, but gross and massive violations of human rights, such as genocide, slavery, execution without due process or arbitrary execution.

60. Human rights violations which have already been recognized or could be recognized as international crimes should entail the gravest responsibility for the States perpetrating them, as well as criminal responsibility for individuals participating in their perpetration. In this case, the connection between the responsibility of the State and that of the individuals is truly inseparable. A State which commits an act recognized as an international crime is responsible under international law. The persons participating in the commission of such acts bear criminal responsibility for their actions and the basis for such responsibility must be sought in international law. In other words, their responsibility ensues from the fulfilment of the State's obligations provided for in the relevant norms of international law. Acts which, taken together, constitute an international crime are committed by various individuals. They will therefore be held responsible only for their own acts which can be attributed to the acts of States which, as a whole, constitute the international crime committed by the State in question. In principle, such persons may also incur civil responsibility. However, in practice individuals incur mainly criminal responsibility for participating in the perpetration of an international crime by a State.

61. An important aspect of the inseparable connection between the responsibility of the State and of the individuals acting on its behalf in the case of gross and massive violations of human rights is that the criminal responsibility of persons committing these violations can at the same time be regarded as one of the forms of the State's responsibility. Yet there is a difference between the criminal responsibility of individuals as such and the responsibility of the State. They cannot be equated, for there is a qualitative difference between them. The view has been expressed that the State can also be held criminally responsible. However, this idea has not gained a great deal of support. At first sight it can be justified by the

fact that, in certain cases, organizations and not individuals have been recognized as offenders. The Nürnberg Tribunal, for example, found the political leadership of the Nazi party, the Gestapo and the SD to be criminal. If an organization can be declared criminal, then in principle and in certain circumstances nothing prevents a State from being declared criminal, since the State is also a specific organization. It would appear that recognition of an organization as being criminal implies that it incurs criminal responsibility. Yet regardless of whether the possibility or desirability of holding a State (or organizations in general) criminally responsible is recognized or not, hardly anyone would dispute the fact that it is physically impossible to place a State or in general an organization in the dock.

62. In fact, recognition of an organization as criminal does not imply that it should as such thereby be held criminally responsible, which means that the members of that organization can or should be held criminally responsible. This idea constituted the basis of the Charter of the Nürnberg International Military Tribunal and its judgement. Article 9 of the Tribunal's Charter states:

> "At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization."

Moreover, article 10 of the Charter states:

> "In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any case the criminal nature of the group or organization is considered proved and shall not be questioned."

The judgement of the Nürnberg Tribunal states that the member of an organization which the Tribunal declares criminal may subsequently be convicted of the crime of belonging to that organization. Thus the point of declaring an organization to be criminal is to hold its members and not the organization itself criminally responsible.

63. It is clear in any case that the declaration of a State to be criminal could not mean that all its citizens should be held criminally responsible simply because they happen to be its citizens. For this reason, it would not be right to assimilate States to other organizations in matters of criminal responsibility. The very expression "criminal State" in this connection can scarcely be regarded as justified, and in any event, it should not be understood in the criminal law sense. It would be more correct to talk of a State that committed an international crime or crimes. Criminal responsibility in this case should be incurred only by the persons who, by virtue of their position, acted on behalf of the State or used the State as a means of committing an international crime, and not by all the adult citizens of that State. The idea that the criminal responsibility of such persons can be regarded as part of the responsibility of the State which committed the international crime is not a basis for equating an international crime

perpetrated by the State with a crime perpetrated by individuals. Nor does it provide a basis for equating the responsibility of the State with that of individuals. Individuals bear responsibility for their own acts and a State that commits an international crime is responsible for the fact that the criminal acts of certain individuals are also part of its own acts constituting the international crime in question. As physical persons, these individuals incur criminal responsibility and, at the international level, holding them criminally responsible with the consent of the State on behalf of which they acted, or acted against its will, is part of the responsibility of that State under international law. In other words, the State is responsible for the fact that certain persons committed certain acts on its behalf, and those persons are responsible for the fact that they committed certain acts on behalf of the State. These considerations are fully applicable to situations constituting gross and massive violations of human rights perpetrated on the orders of Governments or sanctioned by them.

B. Realization of responsibility for violations of human rights recognized as international crimes

64. The question of gross and massive violations of human rights recognized as international crimes raises at least three serious problems that have to be solved. First of all, there is the problem mentioned above of determining that gross and massive violations have actually been committed. Secondly, there is that of deciding whether the gross and massive violations of human rights committed fall under the heading of international crimes. And thirdly, there is the problem of realizing the responsibility (of States and individuals) for the perpetration of gross and massive violations of human rights constituting international crimes.

65. Although a declaration to the effect that gross and massive violations of human rights perpetrated on the orders of Governments or sanctioned by them are international crimes would not solve these problems, it could facilitate their solution. A parallel with criminal law would be in order: the declaration by a legislature that a certain act is criminal fails to resolve the problem of establishing whether that act has in fact been committed and who committed it, although if a person is to be held responsible for the commission of that act the act itself must in principle be recognized as criminal. A distinction must be made between the material and procedural aspects of this problem. It would be rather pointless to try to decide what procedure should be used to demonstrate that the act in question was committed and that it was committed by a certain person, and what procedure should be adopted to hold that person responsible, if it has not been decided how that act should be treated from a legal standpoint.

66. The first of the above problems has not yet been solved with the help of international machinery and procedures but could be if criteria, recognized at the global or regional level, for defining gross and massive violations of human rights were developed. Yet it can be partially solved and is indeed being solved at the present time: in certain completely obvious cases there is no need to establish any special procedures or machinery to determine that gross and massive violations of human rights have taken place. But in this case account must of course be taken of the danger of the politicization of the problem - a rather frequent occurrence. Nevertheless, practice suggests

that such determination is possible and is based either on the opinion of the overwhelming majority of the members of the international community or on consensus.

67. Establishment of the fact that gross and massive violations of human rights, whose perpetration is reliably confirmed, constitute international crimes also raises difficulties. Certain situations are of course perfectly clear. For example, the legal assessment of the official policy of apartheid pursued by the former South African authorities was not called into question (in any event, not on the part of States signatories of the International Convention on the Suppression and Punishment of the Crime of Apartheid). There have also been self-evident instances of genocide as State policy. In principle, however, a legally compelling decision that gross and massive violations of human rights have been perpetrated by a State and consequently constitute an international crime should be reached either by some worldwide forum (with a sufficiently large measure of unanimity) or an international judicial body. A one-sided determination on the part of a particular State could be rejected by other members of the international community and, moreover, might be politically slanted. This problem is part of a much broader issue, namely, how a legally compelling decision can be taken on whether the acts of a certain State constitute an international crime? This issue is being studied by the International Law Commission. It is as yet a long way from solution. 14/

68. The solution to the third problem - that of realizing responsibility for human rights violations recognized as an international crime - depends on the solution of the first two. However, the main ways in which this may be done can already be described. The responsibility of a State which perpetrated gross and massive violations of human rights constituting international crimes can above all be realized if it voluntarily acknowledges its responsibility or if the international community applies coercive measures against it. It can also be realized by various ways and means in accordance with existing international law. Lastly, it can be realized in favour of a certain State (whose citizens, for example, suffered), a number of States or the entire international community. A combination of various ways and means of realizing a State's responsibility is also possible.

69. The responsibility of individuals, acting on behalf of a State and participating in the perpetration, by that State, of gross and massive violations of human rights constituting an international crime can be realized on the basis of the laws of the State which was injured as a result of the crime, on the basis of the laws of the State on behalf of which the individuals in question acted, or in accordance with an international agreement. In the first two cases, responsibility is realized above all through the national courts and in the last case through an international court. International judicial bodies set up for that purpose may be ad hoc tribunals established to consider the cases of specific persons (the Nürnberg and Tokyo Tribunals, for example) or institutional, established to consider a certain category of cases regardless of whether the accused are known previously or not. It is proposed that the international criminal court should be a court of this nature.

70. It would be premature to try to determine which methods of realizing responsibility would be the most productive and in any event consideration of this point, quite apart from anything else, falls outside the scope of the present working paper. However, it is important to emphasize that the commission by an individual of any acts on behalf of a State which constitute international crimes, i.e. which are regarded as constituting a serious violation of international law committed by that State and a threat to the international community as a whole, should not be used to justify the individual in question. The judgement of the Nürnberg Tribunal states:

> "The principle of international law which, under certain circumstances, protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment."

In other words, the acts of a State constituting an international crime should automatically be regarded as a crime against international law (a crime under international law), perpetrated by persons acting on behalf of the State, and incur the responsibility of such persons.

71. The judgements of the Nürnberg and Tokyo Tribunals were based on the principle of individual responsibility for international crimes, which is embodied in international law. This principle implies the general obligation of States to hold persons using the State as a means to commit an international crime criminally responsible. The "decipherment" of this principle by legislation is not mandatory at the time of the commission of the crime. Domestic law may not contain provisions that envisage criminal responsibility for acts regarded as international crimes at the inter-State level. In other words, this permits derogations from the principle according to which criminal law does not have retroactive force. This is confirmed by article 99 of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, which states: "No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed." It has repeatedly been pointed out in the doctrine that there is no general rule in international law against retroactive legislation. 15/ The principle of individual responsibility for international crimes is, of course, fully applicable to gross and massive violations of human rights constituting international crimes.

IV. CONCLUSIONS

72. It would be appropriate to state in a General Assembly declaration that any gross and massive violations of human rights perpetrated on the orders of a Government or with its sanction constitute an international crime. Since declarations adopted by the General Assembly are recommendations, the statement of this position in the form of a declaration will not in itself mean that it will promptly become a principle of international law. Experience shows, however, that principles and norms declared in such a manner stand a better chance of eventually becoming universally recognized (especially if they are adopted by consensus) than if they are laid down in treaty form, and their declaration hastens the process of establishing them as

general international legal obligations. It should also be borne in mind that reaching a consensus in drafting and approving a given declaration is often made easier by the fact that its terms are not legally binding.

73. The declaration must be concise, since it is to be a statement of principle, but it must also be more detailed than the provisions of the draft articles on State responsibility cited above concerning gross and massive violations of human rights. In addition to the general statement of principle, it would seem appropriate to enumerate, in greater detail than hitherto, the more typical gross and massive violations of human rights which constitute international crimes. It may also be useful to explain some of the terms used. In addition, the declaration must without fail refer to the inseparable link between the responsibility of the State that the perpetrated gross and massive violations of human rights which can be classified as international crimes and the individual responsibility of persons participating in their perpetration.

ANNEX

Draft declaration on the recognition of gross and massive violations of human rights perpetrated on the orders of Governments or sanctioned by them as an international crime

The General Assembly,

Proceeding from the fact that one of the main purposes of the United Nations is to promote and encourage respect for human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion,

Deeply concerned that in many parts of the world gross and massive violations of human rights are being perpetrated on the orders of Governments, with their direct or indirect support, or with their consent or agreement,

Emphasizing that such violations constitute the most dangerous forms of human rights violations,

Recalling that the World Conference on Human Rights, in the Vienna Declaration and Programme of Action, adopted on 25 June 1993, expressed grave concern about continuing human rights violations in all parts of the world in disregard of standards contained in international human rights instruments and international humanitarian law and about the lack of sufficient and effective remedies for the victims,

Bearing in mind the acute need for international measures to curb the most dangerous forms of human rights violations,

Considering that further action is needed to curb gross and massive violations of human rights,

Recognizing the need and urgency of affirming in international law the principle that gross and massive violations of human rights perpetrated on the orders of Governments or sanctioned by them in any way are international crimes,

Proclaims the following Declaration:

Article 1

1. Gross and massive violations of human rights committed on the orders of a Government or with its sanction are a grave violation of the principle of respect for human rights and constitute an international crime.

Such violations shall be deemed to include principally the following:

(a) Murder, including extrajudicial, arbitrary and summary executions;

(b) Torture;

(c) Genocide;

(d) Apartheid;

(e) Discrimination on racial, national, ethnic, linguistic or religious grounds;

(f) Establishing or maintaining over persons the status of slavery, servitude or forced labour;

(g) Enforced or involuntary disappearances;

(h) Arbitrary and prolonged detention;

(i) Deportation or forceable transfer of population.

2. The provisions of paragraph 1 should not be regarded as detracting from the right of States to establish, in conformity with the norms of international law currently in force, lawful restrictions of human rights, especially in connection with the declaration of states of emergency or war.

Article 2

1. The term "Government" shall be understood to mean the ruling power, irrespective of its structure and designation, which controls a country or the part or parts of a country where the violations of human rights referred to in article 1 have occurred or are occurring.

2. A Government shall be deemed to have sanctioned such violations if, while in control of the country or of the part or parts of the country where they occurred, it:

(a) Instigated them;

(b) Connived in the perpetration of such violations and failed to bring the officials responsible to account, irrespective of the positions they occupied;

(c) Directly or indirectly, officially or tacitly, approved after the commission the violations of human rights in question;

(d) Was in some other way involved in their perpetration.

Article 3

1. States whose Governments perpetrated gross and massive violations of human rights or whose Governments sanctioned them are responsible under international law for such violations as for an international crime.

2. Persons who order, organize, directly perpetrate, connive in or sanction such violations, irrespective of whether they are acting in an official capacity or are able to influence the Government by virtue of the positions they occupy, shall be held criminally responsible at national or international level.

Notes

1/ Yearbook of the International Law Commission, 1980, vol. II, Part 2, p. 32.

2/ A/CN.4/L.527/Add.1 of 22 July 1996, p. 1.

3/ See, for example, Mr. Cherif Bassiouni. International Criminal Law. A draft international criminal code. Sijthoff and Noordhoff, 1980, pp. 41-42.

4/ Report of the International Law Commission on the work of its forty-fifth session, 3 May to 23 July 1993 (Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10), p. 113.

5/ Report of the International Law Commission on the work of its forty-sixth session, 2 May to 22 July 1994. (Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10), p. 72.

6/ Ibid, p. 72.

7/ Ibid, p. 70.

8/ Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Maastricht, 11-15 March 1992. SIM Special No. 12, p. 22.

9/ Ibid.

10/ M. Stohl, D. Carelton, G. Lopez, S. Samuels. State Violations of Human Rights: Issues and Problems of Measurement, in HRQ, vol. 8, No. 4, pp. 599-603.

11/ Barcelona Traction Case. International Court of Justice. Reports of Judgments, Advisory Opinions and Orders. Judgment of 5 February 1970, p. 33.

12/ E/CN.4/Sub.2/1990/10, 26 July 1990, para. 33.

13/ E/CN.4/Sub.2/1996/17, 24 May 1996.

14/ In this connection, see the report of the International Law Commission on the work of its forty-fifth session, 3 May to 23 June 1993. Supplement No. 10, paras. 300-306.

15/ See, for example, M. Akehurst, A Modern Introduction to International Law (fifth edition), London, 1985, p. 239.